

NO. 83-1323

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ALEXANDER L STEVENS
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

RICHARD C. COX, ET AL.

APPELLANTS

v.

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT, ET AL.

APPELLEES

* * * * *

ON APPEAL FROM THE SUPREME COURT OF KENTUCKY

APPELLANTS' BRIEF
OPPOSING APPELLEES' MOTION
UNDER RULE 16

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<u>Londoner v. Denver,</u>	210 U.S. 373, 52 L.Ed. 1103, 28 S.Ct. 708 (1907) . .	1, 5, 6
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For their Response to Appellees' Motion to Dismiss Appeal, or in the alternative, to Affirm Judgment, Appellants state:

ARGUMENT

At page 7 of their Motion to Dismiss this Appeal, Appellants concede that Londoner v. Denver, 210 U.S. 373, 52 L.Ed. 1103, 28 S.Ct. 708 (1907) holds that due process requires that a hearing upon the assessment itself must be afforded property owners before the tax becomes irrevocably fixed. However, Appellees contend that the rule of Londoner does not apply (1) where the General Assembly itself has fixed the specific amount of the assessment, or (2) where a municipal legislative body has been granted full legislative power over the subject matter by the state.

The thrust of Appellees' Motion to Dismiss, then, is that Appellants were not entitled to a due process hearing, prior to the assessment tax becoming irrevocably fixed. There is no authority in Appellees' Motion, or otherwise, that (1) the General Assembly

itself has fixed the specific amount of the assessment, or (2) that the Appellee Urban County Council has been granted full legislative power over the subject matter by the state.

The Supreme Court of Kentucky, itself, in Conrad v. Lexington-Fayette Urban County Government, Ky., 659 S.W.2d 190, 197 (1983), the opinion from which this appeal was taken held:

"If a property owner is given an opportunity to be heard at some time during the assessment proceedings before the liability of his property is fixed, due process is satisfied." (Emphasis added)

The Appellees' grounds for dismissal of this appeal are at odds with the opinion of the Kentucky Supreme Court, from which Appellees took no cross-appeal. Suffice it to say, that the authorities cited by Appellees, suggesting that Appellants were not entitled to a due process hearing before liability for the assessment attached have no place in this appeal. If (1) the General Assembly had fixed the specific amount of the

assessment itself (which it did not), or if (2) the legislative body of the Urban County Government were autonomous (which it is not), the Supreme Court of Kentucky certainly would have said so.

Appellees' contention (at page 9 of their Motion) that Appellants should await enforcement of the special assessment to contest the amount, only reinforces the justification for review by this court of this appeal. The Kentucky Supreme Court having held that Appellants were, indeed, entitled to a hearing before liability attached for the assessment, and having, further held (incorrectly as Appellants contend) that the hearing was held "at a meaningful time and (in a meaningful) manner" (659 S.W.2d 190, 197), dismissal of this appeal would result in Appellants being faced with an insurmountable hurdle to a challenge by these Appellants of the amount of the assessment in the future. Appellees do not even suggest that Appellants have had a hearing on the amount of the special assessment. If this appeal is dismissed,

any attempted challenge by these Appellants to the amount of the assessment in the future, would be met head on by the defense of the doctrine of issue or claim preclusion, which Kentucky courts have adopted. Sedley v. City of West Buechel, 461 S.W.2d 556 (1970). The Appellees' strategem, then, is to seek dismissal here, contending that the appropriate time for Appellants to challenge the amount of the assessment is in the future, knowing that an Order declining jurisdiction by this court may not be cited for any purpose. Then, Appellees would be in the position to assert preclusion as a defense to any future challenge to the amount by Appellants.

As authority that due process was satisfied, the Kentucky Court, at page 197, cited Shaw v. City of Mayfield, 204 Ky. 618, 265 S.W.13 (1924), without comment. Shaw, at page 265 S.W.13, 14 held:

"The hearing before the council as provided in the ordinance and in the statute must be a hearing on the merits, such a hearing as constitutes a valid hearing at common law. It includes the right to be heard by word of mouth and also to introduce proof and to be

heard by counsel. If such a hearing is not given before the council, the assessment made by it cannot be enforced. Londoner v. Denver, 210 U.S. 285, 28 Sup.Ct. 708, 52 L.Ed. 1103." (Emphasis added)

It must be remembered that under KRS 67A.875(6), the public hearing restricted the owner of benefited property to be heard on only the following three matters:

"...as to whether the proposed project should be undertaken, whether the nature and scope of the project should be altered, and whether the project shall be financed through the assessment of benefited properties and issuance of bonds in respect of assessments not paid on a lump sum basis...."
KRS 67A.875(6).

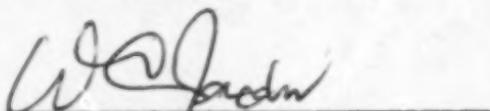
The Kentucky court in Conrad, at page 197 noted that property owners "were given an opportunity to speak at the public hearing as required by statute." The superficiality of the public hearing, as well as the fact that the public hearing was but a question and answer session with no right or opportunity to challenge the amount of the assessment is evident from the report of that public hearing which has been certified and transmitted to this court from the record below.

The Appellants had neither the opportunity or right to challenge the amount of the assessment before liability for it attached. The last sentence of KRS 67A.880(2) statutorily prohibits any civil action, other than the one which led to this appeal. That statute, as well as the doctrine of res judicata (preclusion), prevent a challenge by these Appellants to the amount of this assessment after liability for it attached. Due process has been denied.

CONCLUSION

It being clear that this court's ruling in Londoner v. Denver, 210 U.S. 373, 52 L.Ed. 1103 28 S.Ct. 708 (1907) establishes Appellants' due process right to a hearing on the amount of the assessment before liability for it attached, and the Kentucky court having acknowledged that Appellants were entitled to a due process hearing before liability attached, but neglected to include in that right, Appellants' entitlement to a hearing as to the amount, since KRS 67A.875(6) permits no such hearing, this court ought to note probable jurisdiction, in light of the Supremacy Clause [Article 6(2)] of the U.S.

Constitution so as to declare KRS 67A.875(6)
violative of the due process clause of the
14th Amendment to the U.S. Constitution.


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PROOF OF SERVICE

I, William C. Jacobs, as attorney of record for the Appellants herein, certify that on the 22 day of March, 1984 I served three (3) copies of the foregoing Appellants' Brief Opposing Appellees Motion Under Rule 16 by causing true copies hereof to be deposited in a United States post office, at Lexington, Kentucky, with first-class postage prepaid, addressed to the respective counsels of record for such Appellees, at their respective post office addresses of such counsel, as hereinafter set forth, to wit: for Appellees other than Lexington-Fayette County Health Department by mailing same to Hon. Mary Ann Delaney and Suzanne Shively Havens, Lexington-Fayette Urban County Government, Department of Law, 200 East Main Street, Lexington, Kentucky 40507; for Appellee, Lexington-Fayette County Health Department, Hon. Phillip D. Scott, Greenebaum, Doll & McDonald, 333 West Vine Street, Lexington, Kentucky 40507.

The undersigned further certifies that a true copy hereof was served upon the Clerk

of the Supreme Court of Kentucky, such clerk being the clerk of the court whose judgment is sought to be reviewed by causing a true copy hereof to be deposited in a United States post office, at Lexington, Kentucky, with first-class postage prepaid, addressed as follows to wit: Clerk, Kentucky Supreme Court, Room 209, Capitol Building, Frankfort, Kentucky 40601. Further the undersigned certifies that a true copy hereof was served upon the Clerk of the Fayette Circuit Court, such clerk being the clerk of the court possessed of the record herein, by causing a true copy hereof to be deposited in a United States post office, at Lexington, Kentucky, with first-class postage prepaid, addressed as follows to wit: Robert M. True, Clerk, Fayette Circuit Court, Room 200, Courthouse, Lexington, Kentucky 40507.

The undersigned states that all parties required to be served are the parties named above, accompanied by the addresses of their

respective counsel, and that all such parties
have been served, as herein certified.



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